IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 13660 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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THE KHERALU NAGARIK SAHAKARI BANK LIMITED - Applicant(s)
Versus
CHANDRAKANT AMRUTLAL BHAVSAR & 1 - Respondent(s)

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Appearance :
MR PRAKASH K JANI for Applicant(s) : 1,
MR KIRTIDEV R DAVE for Respondent(s) : 1,
MR RAHUL K DAVE for Respondent(s) : 1,
MR AY KOGJE, APP for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 24/04/2007

ORAL JUDGMENT

1. In the present application, the applicant-Kheralu Nagrik Sahakari Bank ltd. has challenged an order dated 29th April, 2006 passed by Additional Sessions Judge, Ahmedabad(Rural), Ahmedabad in Criminal Revision Application

No.17/2006 filed by respondent no.1 herein.

2. Brief facts leading to the present application are as follows :

2.1 The applicant is a cooperative bank engaged in the business of banking as a cooperative society.

2.2 Respondent no.1 at the relevant time was employed as a Peon by the applicant bank.

2.3 The complaint being CR No.I-362/2003 came to be filed on behalf of the applicant-bank against respondent no.1 herein and three more persons namely Jitendrabhai Maganlal Shah, Manoramaben Amrutlal Bhavsar and Kamleshbai P. Shah.

2.4 In the said complaint, it was stated inter-alia that accused no.1-Jitendrabhai Maganlal Shah was the Branch Manager of the applicant-bank, accused no.2-Chandrakant Amrutlal Bhavsar i.e respondent no.1 herein was Peon, accused no.3-Manoramaben Amrutlal Bhavsar is his wife and accused no.4 Kamleshbhai P. Shah was at the relevant time employed by the applicant-bank and posted at Sola Road Branch of the bank and was looking after the task of clearing cheques of current accounts in the bank.

2.5 Respondent no.1 herein opened the Current Account No.5490 in the Sola Road Branch of the applicant-bank in the name of Shreeji Consultancy, Proprietor, Manoramaben Amrutlal Bhavsar. The said account had no overdraft facility or loan facility. Despite which, large amounts of cash were withdrawn from the said account. Such withdrawals were made by respondent no.1 herein knowing fully well that there is no balance in the account and thereby in connivance with Jitendrabhai Maganlal Shah, the branch Manager of the bank and Kamleshbhai P. Shah, committed misappropriation of the funds of the bank. Such misappropriation was to the tune of Rs.25,92,598/- and different transactions illegally and unauthorisedly were carried out between 15th March, 2000 to 30th April, 2003.

2.6 FIR further states that the accused persons had manipulated the entries in the accounts to conceal the misappropriation and had also tampered with the books of accounts of the bank. They were therefore, alleged to have committed offences punishable under Sections 406, 420, 114, 120(B) of Indian Penal Code.

2.7 It is the case of the applicant-bank that respondent no.1 was not readily available for arrest and interrogation after filing of the

complaint and several months after filing of FIR, respondent no.1 came to be arrested by the police.

2.8 On 17th March, 2006, respondent no.1 herein filed an application exh.19 before the learned Judicial Magistrate First Class(JMFC), Ahmedabad(Rural) before whom the trial was proceeding and sought bail under provisions of Sub-section(6) of Section 437 of Criminal Procedure Code. In the application, respondent no.1 herein stated inter-alia that the learned Magistrate had framed the charge and had also fixed the date for taking evidence. However, from the date of framing of charge, no evidence has been recorded. As per the provisions of Sub-section(6) of Section 437 of Criminal Procedure Code, it is the duty of the prosecution to complete the trial within 60 days from framing of the charge. It is also stated that the applicant (i.e respondent no.1 herein) is in custody since 31st May, 2004. On these grounds, in the above-mentioned application, respondent no.1 herein prayed that he should be released on bail.

2.9 Learned Magistrate passed an order on 20th March, 2006 on the application at exh.19 filed by respondent no.1 herein. By the said order, learned Magistrate was pleased to reject the application on the ground that learned

Magistrate has no power to release the applicant on bail.

2.10 Respondent no.1 herein therefore, filed Criminal Revision Application No.17/2006 before the Sessions Court against the order passed by learned Magistrate on 20th March, 2006.

2.11 Learned Additional Sessions Judge, Ahmedabad(Rural), Ahmedabad, allowed the revision application filed by respondent no.1 herein by his order dated 29th April, 2006. By the impugned order, learned Additional Sessions Judge was pleased to release respondent no.1 herein on bail under Sub-section(6) of Section 437 of the Criminal Procedure Code on certain terms and conditions.

2.12 In the said order learned Sessions Judge observed that from the record of the case, it is established that no summonses have been issued to any of the witnesses and after framing of the charge, the case has remained dormant awaiting recording of evidence.

2.13 It is this order passed by the learned Additional Sessions Judge, Ahmedabad(Rural), Ahmedabad on 29th April, 2006, that the applicant has challenged in this application.

3. Learned advocate Shri P.K. Jani appearing for

the applicant submitted that the learned Sessions Judge gravely erred in law in releasing respondent no.1 on bail in exercise of powers conferred under Sub-section(6) of Section 437 of Criminal Procedure Code. He submitted that the order passed by learned Additional Sessions Judge, Ahmedabad(Rural), Ahmedabad is illegal and unlawful and that this Court may therefore, quash and set aside the same.

3.1 Learned advocate Shri P.K. Jani for the applicant submitted that in facts of this case provisions contained in Sub-section(6) of Section 437 of the Criminal Procedure Code are not applicable at all. He submitted that starting point for counting 60 days in bringing the case within the parameters of Sub-section(6) of Section 437 of the Criminal Procedure Code has not yet arrived. He submitted that true interpretation of the said provision only would be that, the starting point of such consideration is the date on which evidence of first prosecution witness is examined and at no time earlier than that.

3.2 Learned advocate Shri Jani further submitted that reliance placed by the Additional Sessions Judge on order dated 17th October, 2005 passed in Special Criminal Application No.476/2005 is totally misplaced. He pointed out that there is no ratio laid down by the learned

Judge in the said order and in fact it is specifically stated that the parties do not insist for reasoned order. The learned Additional Sessions Judge ought not to have followed the said order mechanically.

3.3 It is also submitted that the order passed by the learned Magistrate refusing to grant the bail to respondent no.1 herein was an interlocutory order and that therefore, revision application under Sub-section(2) of Section 397 of the Criminal Procedure Code was not maintainable.

3.4 It was further submitted that Learned Single Judge of this Court in case of Jitendrabhai Maganlal Shah who was the Branch Manager of the bank at the relevant time at Sola Road Branch was pleased to cancel the bail granted to the accused by the Sessions Court, by a detailed judgement dated 12th April, 2006 passed in Criminal Misc. Application No.11326/2006. He pointed out that SLP against the said decision of Learned Single Judge of this Court has also been dismissed by the Apex Court.

3.5 It is further contended that learned Additional Sessions Judge granted bail to respondent no.1 herein without fully appreciating the seriousness of allegations and

other relevant aspects of the matter. It is submitted that even in a case falling within the parameters of Sub-section(6) of Section 437 of the Criminal Procedure Code, bail should not be granted as a matter of course or mechanically.

3.6 In this regard reliance in placed on the decision of Learned Single Judge of this Court dated 5th May, 2005 passed in Criminal Misc. Application No.944/2005 in which the Learned Single Judge was pleased to uphold the order refusing to grant bail even when the period of 60 days envisaged under Sub-section(6) of Section 437 of the Criminal Procedure Code was over, considering the facts and circumstances of the case.

3.7 Reliance was also placed on the decision of Learned Single Judge of Orissa High Court in case of **Chhabi v. State of Orissa** reported in 1995(2) Crimes 622, wherein Learned Judge observed that even in cases under Sub-section(6) of Section 437 of the Criminal Procedure Code, the Court is not precluded from considering the nature of allegations.

4. On the other hand, learned advocate Shri K.R. Dave for respondent no.1 herein original accused no.2 has resisted the application. It is contended that learned Additional Sessions Judge has committed no error and this Court therefore,

should reject this application.

4.1 It is submitted that the case of respondent no.1 squarely fell within the provisions of Sub-section(6) of Section 437 of the Criminal Procedure Code. From the Rojkam of the case produced before this Court, it is pointed out that charge was framed by the learned Magistrate on 14th February, 2005. Statement of the accused persons who were present before the Court were recorded in which they had pleaded not guilty. Learned Magistrate had thereafter, fixed 28th February, 2005 as the date of taking evidence. It is contended that therefore, 28th February, 2005 is the starting point from which stage period of 60 days is to be counted for granting bail under Sub-section(6) of Section 437 of the Criminal Procedure Code.

4.2 It is pointed out that after framing of charge on 14th February, 2005, till date no witness have been examined.

4.3 It is further submitted that learned Magistrate erred in law in rejecting the application of respondent no.1 herein on the ground that he has no power to grant the bail. Learned Additional Sessions Judge therefore, only corrected a legal error committed by the learned Magistrate and that therefore, this

Court should not interfere in a discretionary order passed by the learned Additional Sessions Judge.

4.4 It is submitted that parameters for cancellation of bail already granted are vastly different from granting of bail. Reliance in this regard is placed on the decision in the case of **Nityanand Rai v. State of Bihar and another** reported in AIR 2005 Supreme Court 2239.

4.5 It is further submitted that after framing of the charge no further serious progress has taken place in the criminal trial and if the prosecution drags its feet, the accused should not be made to suffer by keeping him behind the bar contrary to the legislative mandate contained under Sub-section(6) of Section 437 of the Criminal Procedure Code.

5. I have also heard learned APP Shri Kogje for the State and perused the material on record.

6. Having heard learned advocates appearing for the parties, in so far as question of applicability of Sub-section(6) of Section 437 of the Criminal Procedure Code is concerned, following facts need to be taken into account.

1) Admittedly, charge was framed by learned Magistrate on 14th February, 2005.

2) On the same date, statements of the accused were recorded. Since they had pleaded not guilty, it was necessary for the learned Magistrate to conduct the trial.

3) The case was thereafter, fixed on 28th February, 2005 for taking evidence.

7. With this factual background in mind, some of the legal provisions need to be appreciated.

7.1 Sub-section(6) of Section 437 of the Criminal Procedure Code reads as follows :

"(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs."

7.2 It would thus appear that if the trial is not concluded within 60 days from the first date fixed for taking evidence in the case, the accused person if is in custody during the whole of the said period, is required to be released on bail unless for reasons to be recorded in writing, the Magistrate otherwise so directs. Sub-section(6) of Section 437 of the Criminal

Procedure Code thus refers to a period of 60 days from the first date fixed for taking evidence.

7.3 Section 240 of Criminal Procedure Code provides for framing of charge and reads as follows :

"240. Framing of charge.-(1)If, upon such consideration examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion could be adequately punished by him, he shall frame in writing a charge against the accused.

(2)The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charge against the accused."

7.4 Section 241 of Criminal Procedure Code pertains to conviction on plea of guilty and provides that if the accused pleads guilty, the Magistrate shall record the plea and may, in his discretion, convict him thereon.

7.5 Section 242 of Criminal Procedure Code pertains to evidence for prosecution and reads as follows :

"242.Evidence of Prosecution.-(1) If the accused refuses to plead or does not plead, or claims to be tried or the Magistrate does not convict the accused under section 241 the Magistrate shall

fix a date for the examination of witnesses.

(2) The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or other thing.

(3) On the date so fixed, the Magistrate shall proceed to take all such evidence as may be produced in support of the prosecution.

Provided that the Magistrate may permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination."

7.6 It can thus be seen that under Sub-section(1) of Section 240 of Criminal Procedure Code, Magistrate has to frame charge, if the requirements contained under the said Section are fulfilled. Such charge, so framed, has to be read and explained to the accused and he has to be asked whether he pleads guilty of the offences charged or claims to be tried. If the accused pleads guilty, the Magistrate has to record the plea and may convict him on such plea. If however, the accused refuses to plead at all or does not plead guilty or claims to be tried or the Magistrate does not convict the accused under Section 241 of the Criminal Procedure Code, he has to fix a date for examination of witnesses.

7.7 Thus on combined and conjoint reading of the provisions contained in Sub-section(6) of

Section 437 of Criminal Procedure Code and Sections 240, 241 and 242 of Criminal Procedure Code, it would be clear that the first date fixed for taking evidence referred to in Sub-section(6) of Section 437 of Criminal Procedure Code would be the date which the Magistrate has fixed for examination of witnesses of the prosecution as provided in Sub-section (1) of Section 242 of the Criminal Procedure Code. Any other interpretation would run counter to the language used in Sub-section(6) of Section 437 of Criminal Procedure Code as also provisions contained in Sections 240, 241 and 242 of the Criminal Procedure Code.

8. Contention of learned advocate Shri P.K. Jani for the applicant that the first date fixed for taking evidence must be the date on which the first prosecution witness is examined is neither borne out from language used in the Section 437(6) nor is in tune with the provisions contained in Section 242 of Criminal Procedure Code. As noted earlier, if the Magistrate proposes to proceed with the trial after framing of the charge under Sub-section(1) of Section 242 of the Criminal Procedure Code, he has to fix the date of examination of witnesses(for prosecution). Sub-section(2) of Section 242 further provides that the Magistrate may on an application of the prosecution issue summons to any of its witnesses directing him to attend or

to produce any document or other thing. Thus, issuance of summons to any prosecution witness by the Magistrate has to be done on an application presented by the prosecution. It is thus the discretion of the prosecution not to seek summons and to present its witness without issuance of any such summons. But in either case the starting point for counting 60 days time for the purpose of Sub-section(6) of Section 437 of Criminal Procedure Code namely, the first date fixed for taking evidence remains the date which the Magistrate under Sub-section(1) of Section 242 of the Criminal Procedure Code has fixed for examination of witnesses of the prosecution.

9. In view of this interpretation, I find that after framing of charge on 14th February, 2005 and recording statement of the accused persons who were present on that date, learned Magistrate fixed 28th February, 2005 as the date on which the evidence of the prosecution was to be recorded. The starting point for considering 60 days under Sub-section(6) of Section 437 of Criminal Procedure Code, therefore, in facts of this case was 28th February, 2005. In that view of the matter, when respondent no.1 herein filed an application exh.19 before the learned Magistrate seeking bail under Sub-section(6) of Section 437 of Criminal Procedure Code, period of 60 days was well over from the fist date fixed for taking evidence. His application was

therefore, maintainable before the learned Magistrate.

10. To my view exercise of powers conferred on the Magistrate under Sub-section(6) of Section 437 of Criminal Procedure Code are not dependent on the conditions laid down under Sub-section(1) of Section 437 of Criminal Procedure Code. In other words, the Magistrate is empowered to grant bail in any case triable by him if the trial is not concluded within a period of 60 days from the first date fixed for taking evidence in the case and if such person has been in custody during the whole of the said period. Once the conditions in Sub-section(6) of Section 437 of Criminal Procedure Code are satisfied exercise of such powers are not further dependent on fulfillment of the conditions contained in Sub-section(1) of Section 437 of Criminal Procedure Code for grant of bail by the Magistrate which are as follows :

> " (i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;
>
> (ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a non- bailable and cognizable offence;"

11. Even after holding that application of respondent no.1 seeking bail under Sub-section(6) of Section 437 of Criminal Procedure Code was maintainable, the question is whether the learned Additional Sessions Judge was justified in granting the said bail and further whether the bail having been once granted in facts of this case is required to be cancelled.

12. In the impugned order, learned Additional Sessions Judge granted bail to respondent no.1 mainly on the ground that the trial has not concluded even after 60 days of first date fixed for recording the evidence. Learned Judge was influenced by the fact that recording of the evidence has not yet begun long after the said period is over. Significantly, the learned Judge did not address to the issue of nature of allegations against respondent no.1 herein.

13. At this stage, one may recall some of the salient features involved in this case.

14. Respondent no.1 was an employee of the Cooperative bank. As per the allegations contained in FIR, he in connivance with other two co-employees, opened a current account in the same branch in which three of them were employed in different capacities. Though in the Current account, there was no overdraft or loan

facility, he managed to withdraw large amounts by cash and ultimately defrauded the bank to the extent of more than Rs. 25 lakhs. The accused persons even tried to tamper with the books of accounts of the bank to conceal this fact. Such fraudulent transactions went on almost for a period of three years unnoticed and well disguised.

15. The Branch Manager of the bank who was granted bail by the Sessions Court has been rearrested pursuant to an order passed by this Court cancelling his bail. The Apex Court refused to interfere with the order passed cancelling the bail. Thereafter, bail application filed by the accused therein also came to be rejected by Learned Single Judge of this Court by an order dated 4th September, 2006.

16. I find that the learned Additional Sessions Judge gravely erred in not appreciating the nature of allegations against respondent no.2 while considering his application for grant of bail. Even under Sub-section(6) of Section 437 of Criminal Procedure Code, it is not a matter of absolute right of the accused to be released on bail once the conditions are satisfied. The provisions contained therein specifically provide that in cases governed by the said sub-section, accused shall be released on bail, unless for reasons to be recorded in writing,

the Magistrate otherwise so directs. It would thus appear that though legislative intent is that ordinarily in cases governed by Sub-section(6) of Section 437 of Criminal Procedure Code, bail should be granted to accused persons, for reasons to be recorded in writing, it is well within the powers of Magistrate to refuse to grant such bail. Under the circumstances, it cannot be gainsaid that even in cases governed under Sub-section(6) of Section 437 of Criminal Procedure Code, the Magistrate still retains discretionary power to refuse to grant bail in appropriate cases. While taking up such application, seriousness of the allegations and the nature of evidence against the accused collected by the prosecution would be very relevant aspects. They cannot be ignored while deciding such bail applications.

17. As noted earlier, learned Additional Sessions Judge granted the bail influenced by the delay in conclusion of the trial and did not address issue of nature of allegations against respondent no.1 and material collected by the prosecution against him.

18. Under the circumstances, I find that despite the limitations of application seeking cancellation of bail, this is a fit case where power of this Court under Section 482 of Criminal Procedure Code should be exercised in

the interest of justice.

19. It is not in dispute that respondent no.1 is facing serious charges of misappropriation of huge amounts of a cooperative bank who is entrusted with small savings of its members. Respondent no.1 was an employee of the bank. He along with the Branch Manager of the bank and another employee is alleged to have defrauded the bank to the tune of more than Rs. 25 lakhs through different transactions spanning over more than three years. Respondent no.1 was holding the post of Peon. As an employee of the bank, he had access on records of the bank and misusing their position could continue fraudulent transactions for years together by tampering with the books of accounts of the Bank. The allegations if proved, may result into serious consequences and punishment under various provisions of Indian Penal Code, some of which prescribe punishment upto maximum of life imprisonment. Without referring to these facts, the bail application of respondent no.1 could not have been granted by the learned Additional Sessions Judge.

20. Additionally, I also find that in case of co-accused namely the Branch Manager of the bank, Learned Single Judge of this Court cancelled the bail considering the gravity of the charge and all other relevant facts and circumstances of

the case. This order has been upheld by the Apex Court and even the regular bail application of the same accused has been turned down. Though apparently, there is some distinction in involvement of Kamleshbhai P. Shah who was employed in clerical cadre and is also alleged to have facilitated the crime, insofar as the present respondent no.1 is concerned, he cannot seek parity with said Kamleshbhai P. Shah. Learned advocate Shri Dave has placed on record an order dated 13th August, 2004 passed by the Learned Single Judge of this Court in Criminal Misc. Application No. 6534/2004 granting regular bail to Kamleshbhai P. Shah. In the said order, learned Judge observed that the statement of witness Bhavanbai Parbat Patel reveals that only Manager had the password for permitting the overdrafts in excess of the balance in the account. Primarily, on this ground the said accused Kamleshbhai P. Shah was granted bail by this Court. Respondent no.1 herein cannot seek parity with the case of Kamleshbhai P. Shah. As noted earlier, bank account was opened by respondent no.1 in the name of firm which of his wife was stated to be the proprietor. If the allegations made by the prosecution against respondent no.1 are established, any possibility of him being innocent victim of conspiracy of defrauding the bank committed by some other persons, would be nullified. Even if the Branch Manager had authorised overpayments on the

account in question, it was respondent no.1 herein who was receiving such payments.

21. Considering all these aspects of the matter, I do not find that the learned Sessions Judge should have enlarged respondent no.1 herein on bail particularly, when he is involved in serious offence of misappropriation of funds of the bank worth lakhs of rupees of which bank he himself was the employee and is also charged with having tampered with the books of account of the bank.

22. I am conscious that the scope of application seeking cancellation of bail is narrow and parameters and considerations for cancellation of bail are vastly different from those governing granting of bail, nevertheless, in appropriate cases, this Court certainly retains power to cancel the bail, if found to have been granted on wholly irrelevant considerations.

23. In the case of **State through C.B.I. v. Amarmani Tripathi** reported in AIR 2005 Supreme Court 3490, the Apex Court after considering large number of decision on the point, noted with approval observations made earlier that the general rule that this Court will not ordinarily interfere in matters relating to bail, is subject to exceptions where there are special circumstances and basic requirements for grant

of bail are completely ignored.

23.1 The observations made in case of **Panchanan Mishra v. Digambar Mishra**, reported in 2005(3) SCC 143 to the effect that it hardly requires to be stated that once a person is released on bail in serious criminal cases where the punishment is quite stringent and deterrent, the accused in order to get away from the clutches of the same indulge in various activities like tampering with the prosecution witnesses, threatening the family members of the deceased victim and also create problems of law and order situation, were also noted.

23.2 Observations made in earlier decisions that when accused stands charged of offences punishable with life imprisonment or even death penalty, in such cases, mere fact that the accused has undergone certain period of incarceration by itself would not entitle the accused to being enlarged on bail, nor the fact that the trial is not likely to be concluded in the near future either by itself would be sufficient for enlarging the person on bail when the gravity of the offences alleged is severe and there are allegations of tampering with the witnesses by the accused, were also noted.

24. Considering all these aspects of the matter, the order of bail granted on 29th April, 2006

passed by Additional Sessions Judge, Ahmedabad(Rural), Ahmedabad in Criminal Revision Application No.17/2006, is required to be quashed. The bail granted is thus cancelled. Respondent no.1 shall surrender within a period of four weeks from the date of this order.

25. In view of the fact that I find that even on merits the order passed by the learned Additional Sessions Judge cannot be sustained, it is not necessary to examine the contentions of learned advocate for the applicant that learned Additional Sessions Judge had no power to entertain the revision application against the order passed by learned Magistrate.

26. In the result, application is allowed. Rule made absolute.

(Akil Kureshi,J.)

(raghu)